Mind Tapping: Psychiatric Subversion Of Constitutional Rights

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The right to a public trial and to decent limits on methods permitted the prosecution for incriminating the accused are among the most important features of a free society. The more these liberties are compromised, the more tyrannical is the government's hold over the people.

The expanding use of psychiatric interventions in the enforcement of the criminal law has, in my opinion, steadily diminished our constitutional liberties. The recent practice of pre-trial psychiatric examination of defendants, on the order of the court and against the wishes of the accused, promises to effectively nullify some of our most important constitutional rights—namely, the right to a speedy trial and the right, in the words of Louis D. Brandeis, "to be let alone."

II

The Sixth Amendment to the Constitution guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment does not say that this right is contingent on the ability of the accused to prove his sanity to the satisfaction of government psychiatrists.

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The right to be let alone (more specifically, the privilege against self-incrimination) has received extensive judicial consideration—for example, in connection with wire tapping as a method of securing evidence for use in criminal trials. The majority of the Supreme Court judges—wrote Justice Douglas —have found "that wire tapping violated the command of the Fourth Amendment against unreasonable searches and seizures, and infringed on the guaranty of the Fifth Amendment that no one person shall be compelled to be a witness against himself." Chief Justice Oliver Wendell Holmes called wire tapping a "dirty business." Associate Justice Louis D. Brandeis held that the Fourth and Fifth Amendments conferred upon the citizen, as against the government, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. Wire tapping was the most oppressive intrusion into the right of privacy that man had yet invented." Evidently, Brandeis did not anticipate involuntary pre-trial psychiatric examination. This, I submit, is an even more insidious invasion of privacy, and an even greater violation of the privilege against self-incrimination, than wire tapping.

It may be objected that mind tapping, as against wire tapping, is intended for the defendant's benefit, and hence, in the final analysis, is not injurious to his "best interests." Let us see if this is so.

III

Mental illness or incompetency, of sufficient severity, has, for a long time, constituted an excusing condition in the Anglo-American criminal law. Since mental illness is considered to be an excusing (or sometimes a mitigating) condition, it logically falls upon the shoulders of the accused, or his counsel, to introduce this issue into the criminal proceeding. In other words, just as the defendant has the right to plead either innocent or guilty, so he has the further right to plead insanity. He also has the right to plead that, because of the state of his physical or mental health, he can not effectively assist in his own defense, and hence ought not to be tried. This plea implies that the accused will submit to treatment so that, as soon as he is restored to health, he can be tried.

Progressive psychiatrization of the American criminal law in recent decades has introduced a new wrinkle into this traditional scheme. In the first place, mental illness is no longer considered to be merely a "defense." Instead, it is considered to be a disease like any other disease—a scientific "fact" which is alleged to be "objectively verifiable" by psychiatric experts. Second, psychiatrists have shown great alacrity at meting out life sentences in psychiatric institutions to people whom they consider deserving of this fate.

These two developments have made the issue of the defendant's possible insanity of considerable interest and attractiveness not only to his defense counsel, but also to the prosecution and the judge. For the prosecution, establishing the defendant's insanity, instead of his guilt, may become an easy method of securing "conviction" and "imprisonment"; the defendant will be incarcerated in a psychiatric institution for an indefinite period—a sentence at least as severe and probably more so than would result from conviction and sentencing to a penitentiary. To the judge, too, establishing the defendant's incapacity to stand trial may be tempting; it will save him the effort of conducting a trial that may be filled with distressing emotional and moral conflicts and dilemmas. Both he and the jury will be spared a taxing existential encounter, if only the defendant could be shown to be crazy. These are only a few of the more obvious incentives and seductions that may motivate men to subvert the rights guaranteed by the Constitution and the Bill of Rights. There are others.

IV

There is an important difference, however, between wire tapping and mind tapping. Wire tapping can be carried out without the suspect's awareness, and hence also without his consent and cooperation. In contrast, mind tapping—for that is what involuntary psychiatric examination really is—requires a measure of cooperation on the part of the subject. The question arises, what happens if the defendant refuses to submit to pre-trial psychiatric examination?

As a rule, pre-trial psychiatric examination is a consequence

of a plea of insanity on the part of the defendant. In some of these cases, the defendant submits willingly to examination by his own psychiatrist, that is, by the psychiatrist retained by the defense counsel, but refuses to be examined by the psychiatrist retained by the prosecution. In the face of this dilemma, the courts and legal scholars have held, first, that a person's unwillingness to participate in a psychiatric interview is itself *prima facie* evidence of mental illness. The defendant may thus be committed to a mental hospital, where he will stay until he cooperates with the psychiatrists, and perhaps longer. Second, they have suggested that when a defendant pleads insanity, and yet refuses to submit to a pre-trial examination at the hands of psychiatrists appointed by the court or by the prosecution, his refusal ought to be interpreted to mean that he is competent to stand trial.

Suppose, however, that the issue of insanity is raised not by the defendant (or his counsel), but by the court (or the prosecution). Suppose, further, that the defendant refuses to submit to pre-trial psychiatric examination, and demands to be tried. What would happen in such an instance? How would the criminal action against the defendant proceed?

This is an exquisitely significant dilemma. If a defendant had the good sense to refuse to submit to a court-ordered psychiatric examination—for, obviously, today he has nothing to gain, and everything to lose, by submitting to it—he would force the hands of the judge and the prosecutor. Indeed, we might look on such refusal as similar to a well-designed experiment in physics. From its outcome, we could draw far-reaching inferences about the particular social processes that we are observing, just as a good experiment in physics allows us to draw inferences about the physical processes that are being investigated.

V

Like all crucial experiments, this one too seems to be carried out only very rarely. In most cases, the defendant is an indigent person, who, unassisted, is probably unable to understand the complexities of the situation; and he is usually poorly represented by court-appointed defense counsel. There may be other

reasons as well why this dilemma has thus far been not more sharply etched.

Recently, however, two clear-cut answers, each from a different source, have been supplied. The first comes from Stephen S. Chandler, Chief Judge of the United States District Court for the District of Oklahoma. Judge Chandler presented his views on law and psychiatry before the Hearing of the Senate Subcommittee on the *Constitutional Rights of the Mentally Ill,* in Washington, D. C., on March 30, 1961. In reply to a question about what he would do if he suspected that a defendant was mentally ill, Judge Chandler stated that he would send the defendant to the medical center for federal prisoners, at Springfield, Mo., for psychiatric examination. He enlarged on this:

> I have sent defendants to Mr. Bennett's [James V. Bennett, Director, U. S. Bureau of Prisons] Springfield institution, and I find that I do not know where the money comes from to pay these psychiatrists but surely it is provided in 4244, is it—I have not read it in many years—but I just appoint them. The Department of Justice pays the psychiatrist, and they have never raised any question to me and I appoint good ones, and then see to it that the psychiatrist does not get any information—*that the Government does not try to influence him.* I ask him to take the case and study it and give me a report that I can depend on.
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> I do not appoint a psychiatrist in whom I do not have the utmost confidence as to his ability and integrity.
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> If there are any others, I do not know. I think it is important that the judge have confidence in any doctor whom he appoints.
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> I might say this: In this work we have lots of problems. Sometimes Government officials do not cooperate fully. But I want to say this about the witness just before me, Mr. Bennett, if a judge cares enough to go to the trouble to take matters up with Mr. Bennett, he will help you work matters out to the extent of his facilities. He does not have enough doctors, he does not have enough facilities, it is pitiful, and I would say to this committee that he is a great and good man. I have learned that in 18 years of contact with him as an official, and I would consider very seriously any of Mr. Bennett's recommendations, because I think he knows better than anyone.
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> I think he has no ax to grind with anybody except to do a fine job and he looks at it as some Government officials do not, from the standpoint of the defendant as, of course, the judge should. [Italics added; p. 248.]

It should be noted that Judge Chandler tried to define this procedure as being for the welfare of the defendant.

Miss Elyce H. Zenoff, Counsel for the Subcommittee, then asked the question that constitutes the "crucial experiment":

Miss Zenoff: "What do you do, Judge Chandler, if the defendant himself insists that he is not mentally ill and you think he is?"

Judge Chandler: "If there is a question about it, of course, I appoint a psychiatrist, and then if the doctor says there is a question about it, I send him to Springfield to get a report from there, and the only trouble with that is it is as good an institution as Mr. Bennett can make it with the help he has, but he should have a great many more psychologists and psychiatrists there to help him, because at the present time I am informed, that *they can only consult with the man you send there about once a month;* and as to the therapy that he gets and what they know about him, they do not have the staff to make the report that they would like to make, and we would like to have.

"What they do, they do very conscientiously."

Miss Zenoff: "What I mean, Judge Chandler, is if they report back to you that the man is mentally ill, and he says, I want to be tried; in other words, I am not mentally ill, what do you do then?"

Judge Chandler: "Yes. If they find that he is not able to stand trial because of his mental illness, why, I look into it and have a hearing, and if that is right, *he is left there until such time as they report that he is able to stand trial.* But at any moment that it came to me that *someone* thought he was able to stand trial, why I would see to it that an immediate hearing was had to determine that question." [Italics added; p. 248.]

The defendant's own plea to be allowed to stand trial would thus be overruled solely on the basis of the opinion of government psychiatrists. Note, further, that Judge Chandler went so far as to add that should it come to his attention that "someone thought he [the defendant] was able to stand trial," he would hold a hearing "to determine that question." Evidently, the defendant is not included among the people grouped under the heading "someone" for his protestations of sanity have already been ruled out of court by Judge Chandler.

But it is precisely to the accused—not to his wife or father or friend or attorney—that the Sixth Amendment guarantees the right to be tried!

Recently, in the prosecution of Mr. Bernard Brous, our crucial experiment was carried out with a somewhat different result. As will be recalled, Mr. Brous is one of the men charged with blowing up two telephone microwave relay towers in the Nevada-Utah desert, in May 1961. At the time of his arrest, he was quoted as saying that he committed these acts in protest

against certain government policies. Thus, the unusual criminal acts presumably were intended to call attention to himself and his views.

According to an Associated Press news dispatch, dated August 14, 1961, printed in *The New York Times,* August 16, 1961, this is what happened to Mr. Brous:

> The Government asked Federal Judge John Ross Monday to find Bernard Brous in contempt for refusing to undergo court-ordered mental examinations . . .
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> Judge Ross ordered psychiatric examinations Aug. 3.
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> United States Attorney Howard Babcock presented an affidavit by a psychiatrist, Dr. Otto Gericke, Superintendent of the Patton, Calif., State Hospital, who said Brous twice had refused to submit to tests.

The cat is now out of the bag. If the pre-trial psychiatric examination is really for the defendant's benefit, why should he be punished for refusing to submit to it? If, on the other hand, it is not for his benefit, then it must be for the benefit of either the judge or the prosecution. In this case, mind tapping would be a clear violation of constitutional rights. Lastly, the prosecution's demand for finding Brous in contempt of court betrays bad faith and unfairness on the part of either the prosecutor or the judge, or both, for it shows readiness to "try" the defendant for his behavior in the court room at the very moment when the court shows itself reluctant to try him for his behavior in the Nevada desert.

Every reader, of course, is free to draw his own conclusions from Judge Chandler's views and from the action of the government in the Brous case. I should like to re-emphasize two points.

In the procedure advocated by Judge Chandler, the mere suspicion of mental illness results in the defendant's loss of the right to be tried. In the Brous case, refusal to submit to court-ordered psychiatric examination is not considered an intelligent defense of one's constitutional rights, but instead is regarded as a fresh offense. Thus, the defendant who protests against involuntary mind tapping, like the "Fifth Amendment Communist" of the McCarthy era, is not supported by the court in his efforts to avail himself of his constitutional rights. Instead, he is attacked for his very self-defense!

VI

Reflecting on this problem, we should not forget the values inherent in the right to be tried, in *public* and by one's *peers,* and also the values inherent in the right to go to jail, instead of being subjected to unwanted psychiatric "treatments." In a jail, a person is "let alone"; in a mental hospital he may not be. A prisoner will be released after he completes his sentence, and possibly before. A mental patient may be required to undergo a change in his "inner personality"—a change that may be induced by measures far more brutal and intrusive than anything permitted in a jail — before the psychiatric authorities let him go. And they may never let him go. Commitment, unlike a sentence, is for an indefinite period.

How different the world might be today if only a handful of people had been sent away for psychiatric "treatments," instead of being tried and sent to jail. Gandhi, Nehru, Sukarno, Castro, Hitler—and of course many others, for example, the "freedom riders" in the South—have been sentenced to terms in prison. Surely, the social *status quo* could have been better preserved by finding each one of these men mentally ill and by subjecting them to enough electric shock treatments to quell their aspirations.

If this it not the sort of tyranny against which the Constitution was intended to protect us, what is?

VII

My argument rests. Some may object. After all—they may reply—psychiatrists are honest men. They would not claim that a person was mentally ill if they did not believe it was true. I have no intention of impugning anyone's honesty. But honesty is not the issue. The issues are mental illness and the right to be tried.

What constitutes mental illness is conveniently undefined. Its presence is ascertained by reference to the judgment of experts, in this case, psychiatrists. In this respect, mental illness is like witchcraft, which was also never clearly defined, but which experts had little difficulty diagnosing.

Given these circumstances, I submit that government psy-

chiatrists (or so-called forensic psychiatrists, generally)—like ecclesiastic witchhunters—will easily find large numbers of mentally sick people. This will be especially true whenever the "right" sorts of persons prefer the "charge" of insanity. If this is doubted, we should only ask ourselves how long the witchhunter who never found witches would have lasted in his job? Similarly, how long would a court retain a psychiatrist who found most defendants fit to stand trial, and who would never interfere on psychiatric grounds with the trial of a defendant who wanted to be tried. Finally, would such a psychiatrist be as popular as those of his colleagues who find the defendant incompetent to stand trial in virtually every case in which this issue is raised by an important personage, whether judge, defense counsel, or prosecutor?